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84738—34

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 25

UNITED STATES OF AMERICA, APPELLANT

v.

JACOB TROY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 7–8) is reported in 6 F.Supp. 315.

JURISDICTION

The judgment to be reviewed was entered February 22, 1934 (R. 7–8). An appeal to this Court was allowed March 22, 1934 (R. 9). The jurisdiction of this Court to review by direct appeal the judgment involved is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246

(U.S.C., Title 18, Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the president of a corporation filed a false and fraudulent income tax return for the corporation, with intent to defeat a portion of the tax owing by such corporation and the payment thereof, is it essential in order to establish a violation of Section 146 (b) of the Revenue Act of 1928 by such president, to allege and prove that he was under a duty to file such corporate return?

STATUTES INVOLVED

These will be found in the Appendix, *infra*, pp. 8–9.

STATEMENT

On June 7, 1933, the appellee was indicted in the District Court of the United States for the Middle District of Pennsylvania, under Section 146 (b) of the Revenue Act of 1928, the indictment charging that the appellee, as president of the Troy Oil Company, Inc., unlawfully did willfully and knowingly attempt to defeat and evade a large part, to wit, $4,429.08, of the tax due upon the net income of $40,722.56 of the corporation for the calendar year 1929, by making under oath and filing an income tax return for the corporation which stated that the net income of the corporation was $3,458.14,

and that the tax due and payable was $50.40 (R. 1–4).

A motion for a rule to show cause why the indictment should not be quashed was filed on October 13, 1933, on the ground that (R. 5):

> The indictment is defective because it fails to aver that Jacob Troy was under a duty to perform the act in respect of which there was a violation charged of the act of Congress of May 29, 1928.
>
> The indictment is defective in that it fails to set forth that the defendant was under a duty to perform the act in respect of which the violation occurred and in the absence of this averment the indictment fails to set forth facts showing prima facie, a commission of the crime charged in the indictment.

The rule was granted by the District Court (R. 5) and an answer was filed by the United States (R. 6–7). On February 22, 1934, the District Court held that to establish an offense under Section 146 (b) of the Revenue Act of 1928, it was necessary that the Government allege and prove that the defendant was under a duty to file the corporate return in question, and that since the indictment contained no such allegation it was defective. The court accordingly made the rule to show cause absolute and quashed the indictment (R. 7–8). On March 22, 1934, a petition for appeal to this Court was presented and allowed (R. 9).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In quashing the indictment.

(2) In holding that the facts pleaded did not constitute a violation of any statute of the United States.

(3) In holding that the indictment is defective, in that it fails to set forth that the defendant was under a duty to perform the act in respect of which the violation occurred.

(4) In construing Section 146 (b) of the Revenue Act of 1928 (upon which the indictment was founded) as requiring, as an essential element of the crime of willfully attempting to evade or defeat the tax involved, that the defendant shall have been under a duty to perform the acts which he in fact performed, and in connection with which the violation charged occurred.

ARGUMENT

The question for consideration is whether the president of a corporation who files on behalf of his corporation a false and fraudulent income tax return in an effort to defeat the payment of a part of the corporate tax, may be convicted under Section 146 (b) of the Revenue Act of 1928, *infra,* where it is not alleged in the indictment that he was under a duty to file the return.

Section 146 (b) in part provides:

> *any person* who willfully attempts *in any manner* to *evade* or *defeat any tax* imposed

> by this title or the *payment thereof,* shall, in addition to other penalties provided by law, be guilty of a felony * * *. (Italics ours.)

The term "any person" includes all natural (*Nigro* v. *United States,* 276 U.S. 332, 344), as well as corporate (Sec. 701 (a) (1), Revenue Act of 1928, *infra*[1]) persons. Likewise, the phrase "*any tax* imposed by this title" (italics ours) must be construed to include *all taxes* imposed by such title, no matter by whom owing. These inclusive terms, when coupled with the phrase "in any manner", indicate a purpose on the part of Congress to cover all possible methods of attempting to deprive the Government of taxes lawfully owing. *United States* v. *Miro,* 60 F. (2d) 58, 60 (C.C.A. 2d). Furthermore, the presence of the word "defeat" in addition to the word "evade" clearly points to an intention not only to reach those who attempt to "evade", escape, or elude a tax directed at them, but also those who attempt to "defeat", frustrate, or nullify the efforts of the Government to collect from another.

It follows that an officer of a corporation who attempts to defeat the payment of the corporation's tax, by the filing of a false and fraudulent income tax return, is guilty of a violation of Section 146 (b) of the Revenue Act of 1928 (*Levy* v. *United*

[1] This section defines the term "person" as including "a corporation."

States, 271 Fed. 942 (C.C.A. 3d); *United States* v. *Smith,* 13 F. (2d) 923, 924 (W.D.La.); *Capone* v. *United States,* 51 F. (2d) 609 (C.C.A. 7th)), certiorari denied, 284 U.S. 669, unless Subsection (c) calls for a different conclusion. That subsection provides:

> The term "person" as used in this section *includes* an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs. (Italics ours.)

In construing this section, the court below seems to have applied the doctrine of *expressio unius est exclusio alterius,* and accordingly held that it was only those corporate officers and employees specifically mentioned in Subsection (c) who could be guilty of attempting to defeat the payment of a corporation's tax. In so holding, the court apparently overlooked Section 701 (b) of the same Act, which provides:

> The terms "includes" and "including" when used in a definition contained in this Act shall not be deemed to *exclude* other things otherwise within the meaning of the term defined. (Italics ours.)

As these two sections are *in pari materia* they should, of course, be read together. So read, we think it is evident that Subsection (c) of Section 146 was not intended in any wise to detract from

Subsections (a) and (b). Its primary purpose undoubtedly was to make certain that an officer or employee of a corporation who was under a duty to file a corporate return or pay the tax due thereon, should be punished for failing to do so, but it clearly was not intended to exempt an officer or employee who, even though not under a duty, took affirmative action which had as its object the defeating or evading of corporate taxes. We submit, therefore, that the court below was in error in construing Subsection (c) as being exclusive instead of inclusive. If we are right in this, it follows that Subsection (c) is not a limitation upon Subsection (b). As we have shown above, without limitation Subsection (b) is clearly broad enough to include the acts charged in the indictment.

CONCLUSION

It is therefore respectfully submitted that the decision below is erroneous and that the case should be remanded for further proceedings.

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SEPTEMBER 1934.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791, 808, 835, 878:

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. * * *

SEC. 146. PENALTIES.

(a) Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this title to collect, account for, and pay over any tax

imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 701. DEFINITIONS.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(b) The terms "includes" and "including" when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(U.S.C.Sup. VII, Title 26, Sec. 1696.)

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